Fox Rothschild LLP
ATTORNEYS AT LAW

California Update

EMPLOYMENT LAW

Fourth Quarter 2010

Victory for Employers in Wage Case!

In a purported class action against United Retail Inc., an employee alleged that her former employer's wage statements failed to comply with California Labor Code §226(a) because the paystub listed the total number of regular hours and total number of overtime hours worked by employee but did not list the sum of the regular and overtime hours worked in a separate line. The employee alleged that a separate line with a total sum was required by Labor Code §226(a)(2).

Labor Code §226 requires employers to provide employees with accurate itemized wage statements identifying the following:

(1) Gross wages earned;

(2) Total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under Labor Code §515(a) or any applicable order of the Industrial Welfare Commission;

(3) Number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;

(4) All deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item;

(5) Net wages earned;

(6) Inclusive dates of the period for which the employee is paid;

(7) Name of the employee and the last four digits of his or her Social Security number;

(8) Name and address of the legal entity that is the employer; and

(9) All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

In July, a California appellate court concluded that the trial court properly dismissed the employee's claims because the employer's wage statements complied with the statutory requirements by "showing . . . total hours worked." The court reasoned, in part, that the plain language of the statute did not specifically require two separate lines and that the paystubs used by the employer provided the employees with the essential information for verifying that they were being paid for all hours worked. The case is *Morgan v. United Retail Inc.*, 186 Cal.App.4th 1136 (June 23, 2010).

LATE BREAKING NEWS

Jerry Brown has been elected governor for the second time in his and our lifetimes. Employers are likely in for a difficult time. The makeup of the legislature has not changed, and now that the Schwarzenegger veto pen is being retired, we can expect a raft of anti-employer legislation that Governor Brown will sign. Stay tuned.

In This Issue:

California Supreme Court Creates New Obstacles to Summary Judgment for Employers

Under federal law, "stray remarks" made by non-decision-making co-workers or remarks made by decision-making supervisors unrelated to the decision in question are considered irrelevant and insufficient to defeat a motion for summary judgment. In *Reid v. Google, Inc.*, the California Supreme Court recently limited application of this "stray remarks" doctrine in employment discrimination cases brought under California law.

Reid involved an age discrimination claim by a director of engineering who worked at Google from 2002 to 2004. The plaintiff was 52 at the time he was hired. A review of his first year job performance was positive, but contained the following language: "Adapting to Google culture is the primary task for the first year here. . . . Right or wrong, Google is simply different: Younger contributors, inexperienced first line managers, and the super fast pace are just a few examples of the environment." In addition, a 38-year-old vice president to whom the plaintiff sometimes reported allegedly described the plaintiff's opinions as "obsolete" and "too old to matter" and described the plaintiff as "slow," "fuzzy," "sluggish" and

"lethargic." The younger vice president also allegedly said that the plaintiff failed to "display a sense of urgency" and "lack[ed] energy." The plaintiff claimed that other co-workers called him an "old man," "old guy" and "old fuddy-duddy." A co-worker also joked that the plaintiff's office placard, which had a picture of a compact disc, should instead show an LP.

After a year into his tenure, the plaintiff was relieved of most of his duties and told to focus on developing an in-house graduate degree program and a college recruitment program (but without a budget or staff support). Several months later, when senior management was discussing whether to give the plaintiff an annual bonus, one of his supervisors expressed the opinion that he should be treated "consistently with all similarly situated performers." That same supervisor suggested that Google should also offer Reid a severance package due to the risk of "a judge concluding that we acted harshly."

A month later, Google terminated Reid. Google said it told the plaintiff that his job was eliminated because the company decided not to pursue the in-house graduate degree program. The plaintiff alleged that he was told only that there was not a "cultural fit." Although he was given permission to pursue other positions in the company, e-mails between department heads indicated that doing so would not be productive. In one e-mail exchange, a department head asked to be prepped for her interview with the plaintiff. She received a response advising her how to respond to particular inquiries and concluding that "[w]e'll all agree on the job elimination angle."

Google argued that these statements were "stray," and therefore irrelevant, because they were made by non-decision-makers and were ambiguous and unrelated to the adverse employment decision. Google also argued that application of the stray remarks doctrine is an important tool for trial courts to dispose of unmeritorious cases on summary judgment.

The California Supreme Court disagreed with Google, ruling that it is the jury's responsibility to decide what weight to give the remarks. The court held that summary judgment motions must be decided "on the totality of the evidence, including any relevant discriminatory remarks." According to the court, the "totality of the evidence" test will still allow judges to "winnow out" weak cases because the test allows judges to consider "who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made."

We should expect more discrimination cases to reach trial, as employers will have trouble obtaining summary judgment in these circumstances. This "totality of the evidence" test is really the absence of any test at all and will make it difficult to predict how courts will treat particular cases.

ADA Accessibility Denied: Ensuring the "Chipotle Experience" for Everyone

Maurizio Antoninetti, a paraplegic who uses a wheelchair, sued two Chipotle restaurants in the San Diego area for violations of the Americans with Disabilities Act (ADA). He claimed that the height of the wall separating the food preparation counter from the customer line prevents customers in wheelchairs from seeing the different foods available, choosing their ingredients and watching their orders being assembled, which is part of the "Chipotle experience" that the restaurant advertises. Chipotle had a written policy that required its employees to accommodate disabled customers, by showing or handing them soufflé cups of food samples, for example. The trial court found that Chipotle's written policy constituted "equivalent facilitation" under the ADA's guidelines and denied injunctive relief to lower the wall. Further, the trial court denied injunctive relief based on its determination that the plaintiff's purported desire to return to either of the Chipotle restaurants was "not sincere" because he had previously filed accessibility lawsuits against more than 20 other businesses to which he had never returned.

The Ninth Circuit, however, overturned the trial court's decision and held that the separation wall "subjects [wheelchair-bound customers] to a disadvantage that non-disabled customers do not suffer" and prevents them from enjoying the "Chipotle experience." The Ninth Circuit also cautioned against taking a plaintiff's litigation history into account when determining his or her credibility. The trial court was ordered to reconsider its award of damages and attorney's fees, signaling that the plaintiff will likely be awarded significantly more.

This decision highlights the legal requirement that businesses, especially restaurants and retailers, ensure that a disabled customer has the ability to enjoy their goods, services and facilities in the same way as a non-disabled customer. This decision also hurts a business' ability to argue that a "professional plaintiff," so common in this area of law, is acting in bad faith.

Revised Workers' Compensation Notice Must Be Posted

California's Department of Workers' Compensation released regulations that require all in-state employers to post the new version of the Notice to Employees – Injuries Caused by Work by October 8, 2010. The notice must be posted in a conspicuous location frequented by employees. Failure to post the notice by the October deadline can result in up to $7,000 in civil penalties.

In addition to posting the new Notice by October 8, 2010, all California employers

must distribute the new Your Rights to Workers' Compensation Benefits pamphlet to all employees who start work on or after October 8, 2010, at the time of hire or before the end of the first pay period. Employers can find the new notice online at the California Division of Workers' Compensation web site.

Employers with an existing Medical Provider Network (MPN) must create an MPN Notice and post it next to the revised Notice to Employees – Injuries Caused by Work poster by October 8, 2010. Also, any employee injured at work on or after October 8, 2010, must be given a copy of the newly created MPN Notice.

If you are implementing, changing or terminating your MPN, you must create an MPN Notice and post it next to the revised Notice to Employees – Injuries Caused by Work poster by October 8, 2010. Give the same complete MPN Notice created to any employee injured at work on or after October 8, 2010. Lastly, be sure to give all employees notice that you are implementing, terminating or changing the MPN.

Not on My Property!

A California court just made the nearly impossible – enjoining a union from peacefully picketing on private property – a little easier. An appellate court determined that Ralphs Grocery Store was entitled to injunctive relief against a union that was peacefully protesting on its property and held that the Moscone Act (Cal. Code Civ. Proc. §527.3) and Labor Code §1138.1 were unconstitutional. The case is *Ralphs Grocery Store v. UFCW*, Case No. C060413 (186 Cal.App.4th 1078 (July 19, 2010)).

Ralphs and the union were engaged in a labor dispute over the union's inability to organize the workers at a particular Ralph's store. The union deterred customers, maintained a picket line and passed out flyers in front of the store. Ralphs requested that the protesters relocate off the company's property. When the union refused, Ralphs filed a complaint alleging trespass and seeking injunctive relief.

The appellate court declined to extend *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, which held that speech in a privately owned shopping center was protected because the shopping center was a public forum. The court in *Ralphs* determined that the grocery store was not a public forum because it lacked outdoor seating, restaurants or any other sign that it was a public meeting space, and allowed Ralphs to restrict speech on its property.

Additionally, the court determined that the Moscone Act, which prevents courts from issuing injunctions against labor unions that are picketing peacefully, and Labor Code §1138.1, which places additional procedural burdens upon parties seeking an injunction against a labor union, were unconstitutional because they unjustifiably favor speech related to labor disputes over other speech and force private employers to provide a free speech forum with which the employer may disagree.

For now, employers are better able to protect their private property from the disruption of a union protest. Unions may no longer rely on the Moscone Act or Labor Code §1138.1 to bar employers from obtaining an injunction against a union protest. But don't think the union is going down without a fight. A petition for review has already been filed with the California Supreme Court. If the Supreme Court grants review, this *Ralphs* case will no longer be citable law.

Ongoing Battles Regarding the Reach of California's Prohibition of Covenants Not to Compete

It is fairly well known by now that covenants not to compete are not enforceable in California. Business and Professions Code §16600 is said to contain a "strong public policy" in favor of allowing employees to depart and work for anyone else, including direct competitors of the original employer, even if the employee agreed in advance not to do so. Non-competition agreements are enforceable in many other states.

In an effort to hire out-of-state employees, some California companies have recently attempted to use B&P Code §16600 to nullify non-competition agreements between such employees and companies in states where those agreements are legal and enforceable. The companies attempting to nullify the out-of-state agreements are claiming standing to sue in their own right for "unfair competition" under B&P Code §17200. The case typically takes the form of an action in Superior Court for "declaratory relief." The plaintiff company and the bolting employee ask the California court to declare the covenant between the employee and the original out-of-state employer "void" under California law. The out-of-state employer will likely counter with the argument that the suit seeks an unconstitutional, extraterritorial application of §16600 to citizens of other states, employees and companies alike. What's a court to do? It depends.

The result will likely turn on the interpretation of *Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal.App.4th 881 (1998), a case that lay rather dormant for more than 10 years. Hunter Group was a Maryland corporation that provided computer consulting services for businesses, including customers in California. Hunter competed with Application Group, a California

corporation, for projects. Hunter's employees who resided outside of California, including employee Dianne Pike, had non-competition clauses in their employment agreements. Pike, a resident of Maryland, resigned from Hunter and went to work for its competitor, Application Group. Hunter filed a lawsuit in Maryland alleging that Pike had breached the covenant not to compete in her employment agreement and further alleging that Application Group had interfered with its contractual relationship with Pike. While that suit was pending, Application Group and Pike sued Hunter in California seeking a declaratory judgment that California law (B&P Code §16600), and not Maryland law, applied to Pike's covenant not to compete. Hunter filed a motion to stay the California action based on inconvenient forum grounds. The California court granted Hunter's motion and stayed the California action pending resolution of the Maryland litigation. The Maryland court subsequently granted Application Group's motion for summary judgment because Hunter had failed to present evidence of damage.

Application Group then filed an amended complaint in California seeking a declaratory judgment that:

(1) B&P Code §16600 and §17200, and not Maryland law, applied to Pike's covenant not to compete;

(2) By including a non-competition provision in its employees' contracts in Maryland, Hunter was engaging in "unfair competition" within the meaning of §17200;

(3) Pursuant to §16600 and §17200, Hunter was precluded from enforcing in California any out-of-state judgment or injunction it "might obtain" upholding the validity of its covenant not to compete; and

(4) §16600 and §17200 provided Application Group with a "privilege" to contact and recruit Hunter's employees in Maryland regardless of the covenant not to compete in their employment agreements.

The California trial court ruled that §16600 and §17200 applied and that the covenant not to compete was unenforceable and a "contract to restrain trade," which constituted "unfair competition."

Hunter appealed, arguing that the trial court was wrong in its application of conflict of laws principles. The appellate court concluded that the trial court did not err in applying California law (§16600 and §17200), reasoning that California had a "greater interest" in application of its law to the dispute and that California's interests would be seriously impaired if its policy were subordinated to that of Maryland. Exactly why Maryland had a "lesser" interest in the matter was not fully explained.

Significantly, two other issues were **not** fully litigated in the *Application Group* case: (1) whether the California company could invoke standing under §16600, and (2) whether the extension of §16600 to out-of-state contracts is constitutional. **On the issue of standing**, §16600 itself does not on its face appear to confer standing upon a prospective employer. The question is whether §17200 can somehow be invoked to deem a covenant not to compete an act of "unfair competition" toward a prospective employer. **On the issue of constitutionality**, the U.S. Supreme Court has held that constitutional principles prohibit one state from imposing its laws on other states. Whether the *Application Group* case violates this doctrine by approving the seemingly "extraterritorial" use of §16600 remains to be seen. Sooner or later, two companies – one in California and one outside the state – will have enough at stake that the validity of *Application Group* will be tested.

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